Supreme Court, U.S.
FILED
SEP 29 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 80-64

EDWIN R. EGBERT,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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NATURE OF THE ACTION

The petitioner, Edwin R. Egbert, was convicted by a jury of murder in the second degree, K.S.A. 21-3402, as a lesser included offense of the charged crime of first degree murder, K.S.A. 21-3401. The Kansas Supreme Court affirmed petitioner's conviction on March 1, 1980 in State v. Egbert, 227 Kan. 266 ___ P.2d ____ (1980), (Appendix A 1 of Petition for Writ of Certiorari). Petitioner seeks to invoke the jurisdiction of this Court

pursuant to 28 U.S.C. 1257(3); in support thereof, petitioner erroneously contends that the judgment of the Supreme Court of Kansas is in conflict with decisions of this Court.

QUESTIONS PRESENTED

Whether the decision below was proper under Sandstrom v. Montana, __ U.S. ____61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) and was not violative of defendant's due process rights requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

Fourteenth Amendment:

§1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES

Kansas Statutes Annotated, 21-3401:

Murder in the first degree. Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony.

Kansas Statutes Annotated, 21-3402:

Murder in the second degree. Murder in the second degree is the malicious killing of a human being, committed without deliberation or premeditation and not in the perpetration or attempt to perpetrate a felony.

Kansas Statutes Annotated, 60-402:

Scope of rules. Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, the rules set forth in this article shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

Kansas Statutes Annotated, 60-413:

Definition. A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

Kansas Statutes Annotated, 60-414:

Effect of presumptions. Subject to K.S.A. 4-6, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates; (b) if the facts from which the presumption arises have no

probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

STATEMENT OF THE CASE

In the early evening hours of January 2, 1978, Janet Egbert was picked up by a girlfriend for an evening of entertainment. They proceeded to the girlfriends's parent's home for dinner, then to a local bar for a beer, and later visited the homes of a couple of acquaintances.

Around midnight, Janet was taken back home. Inside the residence, Janet Egbert's

husband, Edwin Egbert, had been waiting. His open, unfounded jealousy over the previous several months and his uncontrolled fit of rage that night culminated in his shooting Janet Egbert in the back, resulting in her death.

Earlier that evening the defendant, Edwin Egbert, had become interested in the whereabouts of his wife, made several phone calls and excursions searching for her. A search for Janet being frustrated, defendant flew into a fit of rage and prepared for his wife's return home. The defendant testified that he was upset when he could not find his wife and as a result thereof went into an uncontrolled fit of rage. He threw their marriage certificate on the floor, broke the glass out of the frame, and tore the license

up into pieces. He proceeded to strike the wall with a cane, breaking the cane and indenting the wall. He then got out and loaded some of his rifles and shotguns. He then turned out the lights and waited.

When officers arrived on the scene, they found articles of clothing scattered about, broken glass, overturned furniture, and the body of Janet Egbert.

Janet Egbert died from a gunshot wound to the upper right back that entered from behind. The untimely death of Janet was not the result of an accident, but rather the end result of defendant's unfounded jealousy and uncontollable anger that had begun several months prior to the murder. The defendant did not stay at the house that evening and explain the circumstances of the death, rather concealed the weapons used, went and got money from friends, and left the city.

The defendant eventually ran out of gas near Winfield, Kansas, and when he attempted to get gas from a local farmer, the farmer called the local sheriff who responded and took the defendant into custody.

The defendant's story was that the victim had come home while he was preparing to pack his items of clothing, including his guns, and leave the house. When she came home, she set her purse down on the floor, subsequently tripping over it and falling, though the purse was located several feet from the body of the victim. The defendant further testified that the victim attempted to pull herself up from the floor by grabbing the barrel of the gun; whereupon, it went off, striking her and killing her.

He maintains this story despite the fact that there were no nitrates present on the clothing of the deceased and that the shot must have been from a distance of greater than 12 inches. As demonstrated by the defendant and the prosecutor during the course of cross-examination, the location of the entrance and exit wounds make the occurrence of the shooting as the defendant describes it impossible.

The defendant was ultimately charged with first degree murder, and convicted by jury of second degree murder. At trial the state requested and the trial court granted the following instruction found in Pattern Instructions for Kansas 54.01:

> There is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true.

Defendant appealed his conviction to the Kansas Supreme Court citing as error the giving of the instruction by the lower court. The conviction was affirmed and the instruction (supra) was held to be proper.

REASON FOR DENYING WRIT

The decision below was proper under Sandstrom v. Montana, __U.S. ____, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) and was not violative of defendant's due process rights requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

In Sandstrom v. Montana, ___U.S. ____, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979), this court held that in a case in which intent is an element of the crime charged, the single-sentence jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates the Fourteenth Amendment requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

While the instant case involves a somewhat similar instruction, there is a significant distinction to be drawn between the Kansas instruction and the instruction held to be unconstitutional in Sandstrom v. Montana, ___U.S. ___, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979).

In Sandstrom, the Montana instruction which this court held unconstitutional was a single-sentence instruction:

> The law presumes that a person intends the ordinary consequences of his voluntary acts.

This Court held that:

> A reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary action (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence -- thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways. See generally . . . State v. Warbritton, 211 Kan. 506, 509, 506 P.2d 1152, 1155 (1973).

Sandstrom cites a number of cases throughout the country (Warbritton, included) that have recognized a constitutional infirmity with the single-sentence instruction on intent. The Kansas Supreme Court in Warbritton held as prejudicial error the giving of the one-sentence instruction stating that (emphasis added):

> In the instant case the defendant's sole defense was his claim of no intention to injure. His only evidence was his own testimony to that effect. The effect of the instruction as given would be to foreclose any consideration by the jury to defendant's testimony serving to rebut the presumption stated in the instruction given. The presumption is rebuttable and may be overcome by evidence to the contrary. (Vol. 1 Wharton's Criminal Evidence [13th Ed.] 134, p.222). It is not a conclusive presumption in the sense that it is a rule of substantive law which applies regardless of facts and which cannot be contradicted by evidence to the contrary. Under the circumstances present, we believe the failure to instruct as requested is prejudicial error.

The Kansas court recognized the constitutional ramifications of the one-sentence instruction since 1973, and has required the trial courts, when applying the instruction regarding criminal intent, to use the complete instruction regarding criminal intent, and to use the complete instruction as set out in Pattern Instructions for Kansas 54.01 (infra).

In the instant case, upon which the petition for Writ of Certiorari is based, the Kansas Supreme Court set out the pertinent distinction to be drawn to Sandstrom. Citing the relevant portion of State v. Egbert, 227 Kan. 266, ___P.2d _____ (1980) the Kansas Supreme Court held:

Defendant next contends that the trial court erred in giving instruction 5 which followed P.I.K. Crim. 54.01, as follows:

> "There is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true."

Defendant contends that this instruction could have been interpreted by the jury as either a conclusive presumption on the issue of intent, or as a burden-shifting presumption, in violation of the rationale of Sandstrom v. Montana, . . . U.S. ..., 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979). Trial was held on May 9, 1978; Sandstrom was not decided until June 18, 1979. PIK Crim. 54.01 was discussed at length by our Court of Appeals in the light of Sandstrom in the recent case of State v. Acheson, 3 Kan. App.2d 705, 601 P.2d 375 (1979) and we need not repeat what was there said. We hold that the two-sentence instruction given creates "a permissive presumption and does not shift the burden of proof to the defendant," as concluded by the Kansas Court of Appeals. (p. 715.)

Based on the distinction drawn by the Kansas Supreme Court regarding the two instructions and the fact that Egbert was tried nearly one year prior to Sandstrom, the state would respectfully request that the petition for writ of certiorari be denied.

Additionally, the State of Kansas supports wholeheartedly the separate concurring opinion in Sandstrom of Mr. Justice Rehnquist, with whom the Chief Justice joins in holding:

> I am loath to see this Court go into the business of parsing jury instructions given by the state trial courts, for as we have consistently recognized, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 147, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973).

CONCLUSION

For these reasons, it is respectfully submitted that the writ of certiorari should not issue to review the judgment and opinion of the Supreme Court of the State of Kansas.

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Very respectfully submitted,

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IN THE SUPREME COURT FOR THE UNITED STATES

EDWIN R. EGBERT, Petitioner,	)	
vs.	)	Case No. 80-64
STATE OF KANSAS, Respondent.	)	CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief in Opposition was mailed, first class postage prepaid, to Russell Shultz, 1333 North Broadway, Suite C, Wichita, Kansas 67214, Counsel for Petitioner, and to Tom Haney, Assistant Attorney General, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612, on the 12th day of September, 1980.

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